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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MONICA BRANCH-NOTO, individually and on behalf)
of JOHN DOE MINOR *NO. 1*, as guardian of said minor,)
TIFFANY PAULSON, individually and on behalf of)
JOHN DOE MINOR *NO. 2* and JANE DOE MINOR)
NO. 1, as guardian of said minors,)

Case No. 2:21-cv-01507 JAD-

DJA

Plaintiffs,

vs.

**PLAINTIFFS'
EMERGENCY MOTION
FOR PRELIMINARY
INJUNCTION**

STEPHEN F. SISOLAK, in his official capacity as)
Governor of the State of Nevada, AARON DARNELL)
FORD, in his official capacity as the Attorney General of)
the State of Nevada, CLARK COUNTY SCHOOL)
DISTRICT, a public entity, DOES 1 through 100.)

Defendants

EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

COME NOW, PLAINTIFFS, MONICA BRANCH-NOTO *Et Al*, by and through the undersigned attorney of record, SIGAL CHATTAH, ESQ., of the CHATTAH LAW GROUP, and JOEY S. GILBERT, ESQ of JOEY GILBERT LAW and pursuant to Fed. R. Civ. Pro. 65 and LR 7-4 [*See Counsel Declaration attached hereto as Exhibit "1"*], hereby move this Court for a preliminary injunction against Defendants, to enjoin them from wanton and arbitrary mask mandate being forced on all students in Clark County regardless of health or vaccination status in violation of a Notice and Hearing requirement as required under the Due Process Clause of the Fourteenth Amendment, *see infra*.

The purpose of this Motion is made on an emergency basis, given the fact that it has been over four weeks since the 2021-2022 school year has started and the Governor's mandate continues citing to the Governor's Emergency Orders on March 12, 2020, over eighteen months ago. Defendants have bypassed Plaintiffs' due process rights with said Mandate and Plaintiffs are entitled to relief thereon.

At this juncture, there is no longer an Emergency, but an obvious abuse of arbitrary and capricious power to control Nevada's students and families and continue to wreak havoc on their mental and physical health. Plaintiffs' Motion is based upon the pleadings and papers on file herein, the Exhibits attached and Declarations filed concurrently herewith, and the following points and authorities.

INTRODUCTION

The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Troxel v Granville* 530 U.S. 57 (2000) citing to *Washington v. Glucksberg*, 521 U.S. 702, 720, including parents' fundamental right to

1 make decisions concerning the care, custody, and control of their children, see, *e.g.*,
2 *Stanley v. Illinois*, 405 U.S. 645, 651. Pp. 5-8.

3 When a child is not competent enough to decide what's in their best interest, the parent
4 or legal guardian steps in. Defendants' mask mandate under the notion of *parens patrie* is
5 unsubstantiated by scientific evidence as demonstrated *infra*. Furthermore, Defendants insert
6 themselves to make medical decisions on behalf of minors across Clark County School
7 District without providing due process to the subject parents effected therewith.

9 Initially, there was limited evidence to support broad masking policies for the general
10 public, and the Centers for Disease Control and Prevention recommended masks only for
11 those infected and medical providers treating them. On April 3, 2020, the Center for Disease
12 Control (hereinafter "CDC") reversed course and recommended that everyone wear face
13 coverings in public, citing new data that showed a "significant portion" of people infected
14 with the coronavirus lack symptoms but can spread the virus to others.

16 But the effectiveness of masks is now being challenged again — fueled, in part, by
17 contradictory signals sent by the CDC. On May 13, 2021 the CDC updated its guidance to say
18 "fully vaccinated people no longer need to wear a mask or physically distance in any setting."
19 But two months later, with COVID-19 cases on the rise and the delta variant becoming
20 dominant in the U.S., the CDC changed course again — recommending "fully vaccinated
21 people to wear a mask in public indoor settings in areas of substantial or high transmission."

23 While Scientists and purported experts figure out the science behind the virus, CCSD
24 students are forced to endure wearing masks for 6-8 hours a day, while in school and engaging
25 in extra-curricular school activities. Simply put, the science simply does not justify the
26 adverse effects caused to students on a daily basis for 6-8 hours a day, five (5) days a week.
27
28

1 Notwithstanding same, parental rights on medical decisions for their children cannot
2 be abrogated by Executive emergency mandates and the State without due process being
3 afforded.

4 **THE SCIENCE IN SHORT**

5 The physical properties of medical and non-medical facemasks suggest that facemasks
6 are ineffective to block viral particles due to their difference in scales¹. According to the
7 current knowledge, the virus SARS-CoV-2 has a diameter of 60 nm to 140 nm [nanometers
8 (billionth of a meter)], while medical and non-medical facemasks' thread diameter ranges
9 from 55 μ m to 440 μ m [micrometers (one millionth of a meter), which is more than 1000
10 times larger. Due to the difference in sizes between SARS-CoV-2 diameter and facemasks
11 thread diameter (the virus is 1000 times smaller), SARS-CoV-2 can easily pass through any
12 facemask. In addition, the efficiency filtration rate of facemasks is poor, ranging from 0.7% in
13 non-surgical, cotton-gauze woven mask to 26% in cotton sweater material. With respect to
14 surgical and N95 medical facemasks, the efficiency filtration rate falls to 15% and 58%,
15 respectively when even small gap between the mask and the face exists. *Id.*

16 Due to the lack of consistent science justifying mask mandates on students in Clark
17 County, coupled with the notion that such a mandate in *parens patriae* without due process
18 does not comply with the least restrictive means possible and violation of the Fourteenth and
19 Ninth Amendments, this Court should enjoin Defendants' mandates requiring all students in
20 Clark County follow said mandates.

21 **JURISDICTION**

22 This court has subject matter jurisdiction over Plaintiffs' claims arising under federal
23 law pursuant to 42 U.S.C. §1983. Plaintiffs further allege that the exercise of this court's
24 jurisdiction over such claims is proper under the rule of *Ex Parte Young*, 209 U.S. 123 (1908)
25

1 (plaintiffs alleging violation of federal law may seek prospective injunctive relief against
2 responsible state official).

3 **STATEMENT OF FACTS**

4 This action challenges the constitutionality of Defendants' Orders and Emergency
5 Directives to curb Plaintiffs' civil rights and liberties by ordering draconian measures and
6 engaging in the intentional infliction of emotional distress of school children and their parents,
7 by mandating students of all Clark County School District, fully masked while attending
8 school. The Due Process Clause of the United States Constitution does not permit a state to
9 infringe on the fundamental right of parents to make child rearing decisions, including
10 arbitrarily forcing children to wear masks in school without due process afforded.
11

12 The COVID-19 pandemic still exists and has existed – unabated and unsuppressed – in
13 Nevada since both the declaration of Emergency in March, 2020 and the initiation of the
14 vaccine roll outs in December, 2020.
15

16 On July 27, 2021, the Clark County School District issued an Updated Mask and
17 Health Guidance for the 2021-22 School Year, requiring students to wear face masks while
18 inside school buildings/facilities, unless medical or developmental conditions prohibit use.
19 Said guidelines also require all students to wear face masks on all District buses, unless
20 medical or developmental conditions prohibit use.
21

22 The CDC issued updated guidance for COVID-19 prevention in K-12 schools on July
23 9, 2021, which provides, in relevant portion, as follows: • Masks should be worn indoors by
24 all individuals (age 2 and older) who are not fully vaccinated. CDC recommended schools
25 maintain at least 3 feet of physical distance between students within classrooms, combined
26 with indoor mask wearing by people who are not fully vaccinated. *See Centers for Disease*
27
28

1 *Control and Prevention, Guidance for COVID-19 Prevention in Kindergarten (K)-12 Schools,*
 2 *updated July 9, 2021.*

3 According to the CDC, children with COVID-19 typically have mild symptoms or no
 4 symptoms at all. The estimated infection fatality rate for children ages 0-17 is 0.00002%. Put
 5 another way, children have a one in a million risk of dying from COVID-19. Moreover, a
 6 recent review found that the mortality risk for children without serious pre-existing conditions
 7 is effectively zero. *Think Twice Before Giving the COVID Vax to Healthy Kids | MedPage*
 8 *Today*

10 For all children, the mortality risk from a COVID-19 infection is lower than from
 11 seasonal influenza.ⁱⁱ The risk of severe disease or hospitalization is about the same. There is
 12 currently no evidence of any increased mortality risk from any variant of COVID-19,
 13 including the Delta variant.

15 On August 4, 2021, Defendant Sisolak issued Emergency Directive 048 which provides
 16 in pertinent part:

17 **Face coverings are required in county school district, charter school, and private**
 18 **school settings as provided in this Section.**

19 **In counties with a population of 100,000 or greater, all kindergarten through 12th**
 20 **grade students (regardless of whether they would be exempt from the face**
 21 **covering requirement based on their age) must wear face coverings while inside**
 22 **school buildings unless granted an exemption consistent with this Section. Face**
 23 **coverings are required indoors regardless of vaccination status.**

24 If allowed to stand, Defendants' Orders and Emergency Directives will not only
 25 continue to violate Plaintiffs' rights under the United States' Constitution, but Defendants will
 26 continue to inflict massive emotional distress on students and parents across Clark County
 27 School District. Defendants' Emergency Powers is a clear and blatant abuse of the intent of
 28 NRS 414.040.

Nowhere in the history of the State of Nevada, has any Governor ever declared an Emergency for 18 months under NRS 414.060. Such declarations and Emergency Orders are arbitrary and wanton violations of Plaintiffs' Constitutional rights and lack due process. Further, Defendants' emergency orders are unsubstantiated or alternatively by little or contradictory scientific data.

LEGAL AUTHORITY

A. STANDARD FOR INJUNCTION

A motion for a preliminary injunction is governed by the multi-factor test outlined by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Under the *Winter* test, the plaintiff has the burden to establish: (1) likelihood of success on the merits; (2) that the plaintiff is likely to suffer irreparable harm if the preliminary injunction is not granted; (3) that the balance of equities favors the plaintiff; and (4) that the injunction is in the public interest. *Id.* Likelihood of success on the merits is a threshold inquiry and the most important factor. *See, e.g., Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. *NRDC v. Winter*, 518 F.3d at 677 (internal citations omitted).ⁱⁱⁱ In our circuit, there is no presumption that the issuance of a preliminary injunction requires an evidentiary hearing. *See Int'l Molders' & Allied Workers' Local Union v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986).

1. Likelihood of Success on the Merits

Plaintiffs are likely to prevail on the merits, or at least have raised a serious question to the merits of their procedural and substantive due process claims against Defendants. To

1 prevail on a claim under 42 U.S.C. § 1983, a plaintiff must show the deprivation of a federal
2 right by a person acting under color of state law. The Ninth Circuit has repeatedly stated that
3 “[t]o obtain relief on a procedural due process claim, the plaintiff must establish the existence
4 of (1) a liberty or property interest protected by the constitution; (2) a deprivation of the
5 interest by the government; 3) lack of process.” *See Shanks v Dessel*, 540 F.3d 1082, 1090
6 (9th Cir. 2008).

8 Procedural due process concerns are not satisfied simply by providing notice and a
9 hearing. The Ninth Circuit has firmly ruled that procedural due process is violated when an
10 adjudicative decision maker deprives a person of protected property interests on the grounds
11 of bias, prejudice, partiality, or maliciousness, regardless of whether there was notice and/or a
12 hearing. *Clements v Airport Authority of Washoe County*, 69 F.3d 321, 333 (9th Cir. 1995).

14 Here, Plaintiffs are forced to send their children to schools in Clark County in masks.
15 The students are forced to endure their faces covered for 6-8 hours a day, during class
16 instruction and in all after school extra-curricular activities. Never were parents given the
17 option to participate in the decision-making medical process which affects the welfare of their
18 children. Never was evidence presented to demonstrate a compelling reason to issue such
19 mandates by the State.

21 In *American Trucking Associations v. City of Los Angeles*, the Ninth Circuit
22 referenced *Winter* in its application of the traditional test and held that “as the Court
23 explained, an injunction cannot issue merely because it is possible that there will be an
24 irreparable injury to the plaintiff; it must be likely that there will be.” *See Am. Trucking*
25 *Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (*emphasis added*).

27 The Supreme Court made clear in *Winter* that the balancing of harms, and review of
28 the public interest, must occur in the context of the specific relief requested. *Winter v.*

1 *Natural Res. Def. Council (Winter)*, 129 S. Ct. 365, 376 (2008). This approach was applied by
 2 the Ninth Circuit in *Sierra Forest Legacy v. Rey*, when it overturned a district court’s denial of
 3 preliminary injunctive relief for failure to analyze the balancing of harms and public interest
 4 in the context of the narrow injunction requested by environmental plaintiffs. *Sierra Forest*
 5 *Legacy v. Rey*, 577 F.3d 1015, 1022–23 (9th Cir. 2009) (citations omitted) (“When deciding
 6 whether to issue a narrowly tailored injunction, district courts must assess the harms
 7 pertaining to injunctive relief in the context of that narrow injunction.”).

9 Here, every day that passes during this school year wherein students are forced to
 10 comply with an arbitrary and unconstitutional mask mandate directly and irreparably harms
 11 Plaintiffs by precluding them from obtaining an education in a normalized setting. The
 12 psychological health risks are delineated *infra*.

13
 14 **B. DEFENDANTS ACTS OF *PARENS PATRIAE* DOCTRINE IS A GROSS**
 15 **VIOLATION OF PLAINTIFFS’ CONSTITUTIONAL RIGHTS AND**
 16 **HARMFUL TO STUDENTS**

17 *Parens patriae* is a Latin term meaning “parent of the fatherland.” In law, it is the
 18 power of the government to intervene on the behalf of individuals or groups of individuals
 19 who are unable to represent their own interests.

20 This *parens patriae* jurisdiction is a right of sovereignty and imposes a duty on the
 21 sovereignty to protect the public interest and to protect such persons with disabilities who
 22 have no rightful protector.

23 Here, Defendants have bypassed parents’ rights under the Fourteenth and Ninth
 24 Amendments to the United States Constitution and have issued a meritless mandate without
 25 due process afforded. Data collected by the COVID-19 School Response Dashboard, run by
 26 education groups including the School Superintendents Association, found that schools and
 27 school districts without mask mandates had lower case rates than schools with mandates.
 28

1 **1. *Defendants Fail to Present Sufficient Evidence to Justify that the Mask***
 Mandate

2 Face masks were designed to be worn in hospitals to prevent saliva droplets from
 3 landing on patients and fellow staff. But for students, wearing a face mask for up to seven
 4 hours per day — 10 for students in extracurriculars — along with social distancing in school
 5 and constant reminders of danger presents some hygiene health risks — and significant mental
 6 health risks.^{iv}

7 The Journal of the American Medical Association published a research
 8 letter suggesting high levels of carbon dioxide detected in children wearing masks. "There
 9 may be some increase in CO₂, but that increase is not physiologically significant," said Dr.
 10 David Cornfield, Chief of Pulmonary, Asthma, and Sleep Medicine and medical director of
 11 respiratory therapy at Lucile Packard Children's Hospital Stanford. The physiological and
 12 psychological effects of wearing facemask and their potential health consequences include the
 13 following provided in the chart in *Exhibit "3"*.
 14 15 16

17 According to the randomized clinical trial out of Germany after three minutes of mask-
 18 wearing, younger children reported high levels of carbon dioxide.^v Dr. Cornfield says this
 19 could be attributed to multiple factors. Reducing virus contamination using facemasks
 20 remains a topic of heated debate among scientists and policy makers [6-9]. At the outset of the
 21 pandemic, World Health Organization (hereinafter "WHO") experts advised that use of
 22 facemasks is not recommended as potential benefits are rather limited and there is a potential
 23 risk of self-contamination if used improperly. Moreover, the WHO stated in their report of
 24 June 5 "At present, there is no direct evidence (from studies on Covid-19 and in healthy
 25 people in the community) on the effectiveness of universal masking of healthy people in the
 26 community to prevent infection with respiratory viruses, including Covid-19"^{vi}
 27 28

1 Contamination of the upper respiratory tract by viruses and bacteria on the outside of
2 medical face masks has been detected in several hospitals.^{vii} Another research shows that a
3 moist mask is a breeding ground for (antibiotic resistant) bacteria and fungi, which can
4 undermine mucosal viral immunity. Limited experimental and observational studies report a
5 reduced risk of SARS-CoV2 virus transmission of 6-80%: the effectiveness varies greatly
6 depending on the type and quality of the masks, the basic contamination level of the studied
7 population, laboratory test used, and epidemic context.^{viii} Aside from the highly variable
8 protective effects, WHO mentions several negative aspects of frequent / long-term use of
9 facemasks, fueling the debate as to whether the benefits outweigh the drawbacks. Many
10 people report claustrophobic experiences and difficulty getting sufficient oxygen due to the
11 increased resistance to inhaling and exhaling. This can lead to an increased heart rate, nausea,
12 dizziness and headaches and several other symptoms.^{ix}

15 In an inquiry among Belgian students wearing mouth masks for one week, 16 %
16 reported skin problems and 7 % sinusitis; Also, problems with eyes and headaches and fatigue
17 were frequently mentioned ^x

18 Furthermore, face masking can provoke an increase in stress hormones with a negative
19 impact on immune resilience in the long term. Facemasks prevent the mirroring of facial
20 expressions, a process that facilitates empathetic connections and trust between pupils and
21 teachers. This potentially leads to a significant increase in socio-psychological stress.

23 During childhood and puberty, the brain undergoes sexual and mental maturation
24 through hormonal epigenetic reprogramming.^{xi} Several studies show that long-term exposure
25 to socio-psychological stress leaves neuro-epigenetic scars that are difficult to cure in young
26 people and often escalate into mental behavioral problems and a weakened immune system.^{xii}
27 A recent study by the CDC concludes that in young adults (18-24 years), the level of anxiety
28

1 and depression has increased by 63% (!) since the corona crisis. A quarter of them think about
 2 suicide. As a result, the use of antidepressants has increased by 25%.^{xiii} Several researchers
 3 have shown a relationship between the increase in stress experiences and the risk of upper
 4 respiratory tract infections and mortality.^{xiv}

5 It is clear that the efficacy of the mask to substantiate a mandate on school children in
 6 Clark County is simply not there when balanced with the damage to children from same.
 7 Defendants simply are unable to justify the science behind the arbitrary mandate to allow
 8 them to engage in *parens patrie*.
 9

10 **C. REGARDLESS OF THE EFFICACY OF DEFENDANTS' MANDATE, THERE**
 11 **IS NO JUSTIFICATION FOR THE VIOLATION OF PLAINTIFFS' DUE**
 12 **PROCESS RIGHTS UNDER THE FIFTH, NINTH AND FOURTEENTH**
AMENDMENTS

13 While not explicitly defined in the U.S. Constitution, the Supreme Court has
 14 "acknowledged that certain unarticulated rights are implicit in enumerated guarantees.... Yet
 15 these important but unarticulated rights [association, privacy, presumed innocent, etc.] have
 16 nonetheless been found to share constitutional protection in common with explicit
 17 guarantees." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-580 (1980).
 18

19 **1. Defendants' Overburdensome Mask Mandates is a Violation of Plaintiffs'**
 20 **Ninth Amendment Rights**

21 The Ninth Amendment to the United States Constitution provides "[T]he enumeration
 22 in the Constitution, of certain rights, shall not be construed to deny or disparage others
 23 retained by the people." *Id.*

24 The Ninth Amendment has generally been regarded by the courts as negating any
 25 expansion of governmental power on account of the enumeration of rights in the Constitution,
 26 but the Amendment has not been regarded as further limiting governmental power. The U.S.
 27 Supreme Court explained this, in *U.S. Public Workers v. Mitchell* 330 U.S. 75 (1947) "If
 28

1 granted power is found, necessarily the objection of invasion of those rights, reserved by the
2 Ninth and Tenth Amendments, must fail." *Id.*

3 Ultimately, as we can see through history, that the purpose of the Ninth Amendment is
4 to ensure that all individual natural rights had the same stature and force the preceding writes
5 incorporated into the first Eight Amendments. This historical roadmap can be seen into the
6 two benchmark cases of *Griswold v Connecticut* 381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d
7 510 (1965) and *Roe v Wade* 93 S. Ct. 705; 35 L. Ed. 2d 147(1973). Justice Arthur
8 Goldberg (joined by Chief Justice Earl Warren and Justice William Brennan) expressed this
9 view in a concurring opinion in the case of *Griswold v. Connecticut* (1965):
10
11

12 The Framers did not intend that the first eight amendments be construed to
13 exhaust the basic and fundamental rights ... I do not mean to imply that the ...
14 Ninth Amendment constitutes an independent source of rights protected from
15 infringement by either the States or the Federal Government ... While the Ninth
16 Amendment – and indeed the entire Bill of Rights – originally concerned
17 restrictions upon federal power, the subsequently enacted Fourteenth
18 Amendment **prohibits the States as well from abridging fundamental**
19 **personal liberties.** And, the Ninth Amendment, in indicating that not all such
20 liberties are specifically mentioned in the first eight amendments, is surely
21 relevant in showing the existence of other fundamental personal rights, now
22 protected from state, as well as federal, infringement. In sum, the Ninth
23 Amendment simply lends strong support to the view that the "liberty" protected
24 by the Fifth and Fourteenth Amendments from infringement by the Federal
25 Government or the States is not restricted to rights specifically mentioned in
26 the first eight amendments. [*Emphasis added*] *Griswold v. Connecticut*, 381
27 U.S. 479 (1965); Cf. *United Public Workers v. Mitchell*, 330 U.S. 75, 94–95.

28 Since *Griswold*, some judges have tried to use the Ninth Amendment to justify
judicially enforcing rights that are not enumerated. For example, the District Court that heard
the case of *Roe v. Wade* ruled in favor of a "Ninth Amendment right to choose to have an
abortion," although it stressed that the right was "not unqualified or unfettered." *Roe v.*
Wade, 314 F. Supp. 1217 at 1223 (1970).

1 However, Justice William O. Douglas rejected that view; Douglas wrote that "The
 2 Ninth Amendment obviously does not create federally enforceable rights." See *Doe v.*
 3 *Bolton* 410 U.S. 179 (1973). Douglas joined the majority opinion of the U.S. Supreme Court
 4 in *Roe*, which stated that a federally enforceable right to privacy, "whether it be founded in the
 5 Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we
 6 feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights
 7 to the people, is broad enough to encompass a woman's decision whether or not to terminate
 8 her pregnancy." *Roe v. Wade*, 410 U.S. 113 (1973).

10 The Sixth Circuit Court of Appeals stated in *Gibson v. Matthews*, 926 F.2d 532, 537
 11 (6th Cir. 1991) that the Ninth Amendment was intended to vitiate the maxim of *expressio*
 12 *unius est exclusio alterius* ^{xv} according to which the express mention of one thing excludes all
 13 others:
 14

15 [T]he ninth amendment does not confer substantive rights in addition to those
 16 conferred by other portions of our governing law. The ninth amendment was
 17 added to the Bill of Rights to ensure that the maxim expression *unique est*
 18 *exclusion alterius* would not be used at a later time **to deny fundamental**
 19 **rights** merely because they were not specifically enumerated in the
 20 Constitution.
 21 [Emphasis added]

22 Justice Antonin Scalia expressed the view, in the dissenting opinion of *Troxel v.*
 23 *Granville*, 530 U.S. 57 (2000), that:

24 The Declaration of Independence ... is not a legal prescription conferring
 25 powers upon the courts; and the Constitution's refusal to "deny or disparage"
 26 other rights is far removed from affirming any one of them, and even farther
 27 removed from authorizing judges to identify what they might be, and to
 28 enforce the judges' list against laws duly enacted by the people.
Id

 Here, the Ninth Amendment rights while independently, do not give parents a right to
 maintain an action against Defendants' mask mandate. But, coupled with both the lack of

1 Substantive and Procedural Due process of the Fifth and Fourteenth Amendments, allow this
 2 Court to the same interpretation that predecessor cases provide the basis for; leaving this
 3 Court with the following examination to undertake: Have Defendants violated Plaintiffs'
 4 substantive and procedural due process rights under the Fourteenth Amendment through the
 5 Ninth Amendment, unenumerated rights by issuing mask mandates, without due process
 6 which the efficacy thereof is called into serious question.
 7

8 **2. *The Mask Mandate Violates Plaintiffs' Substantive and Procedural Due***
 9 ***Process Clauses of the 14th Amendment.***

10 Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive
 11 any person of life, liberty, or property, without due process of law." The fundamental liberties
 12 protected by this Clause include most of the rights enumerated in the Bill of Rights. *See*
 13 *Duncan v. Louisiana*, 391 U.S. 145, 147-149 (1968).

14 It is well established that the deprivation of constitutional rights 'unquestionably
 15 constitutes irreparable injury.' *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)
 16 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also, e.g., Assoc. Press v. Otter*, 682
 17 F.3d 821, 826 (9th Cir. 2012) It is always in the public interest to prevent the violation of a
 18 party's constitutional rights." *Padilla v. Immigration & Customs Enforcement*, 953
 19 F.3d 1134, 1147-48 (9th Cir. 2020).
 20

21 A claim of interference with the parent/child relationship may be brought as either a
 22 procedural due process claim or a substantive due process claim. Whether a claim is
 23 procedural or substantive depends on whether the state action was "for the purpose of
 24 furthering legitimate state interests." *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir.
 25 1987). Substantive due process claims typically involve egregious conduct or the use of
 26 excessive force. But official conduct only violates substantive due process when it "shocks the
 27
 28

1 conscience." *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013) (citing *Wilkinson*
 2 *v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)).

3 For a case that may blur the distinction between procedural and substantive due
 4 process, see *Mann v. County of San Diego*, No. 16-56657 (9th Cir. 2018) (holding that county
 5 violated parents' Fourteenth Amendment substantive due process rights by performing
 6 medical examinations on parents' children without notifying parents and without obtaining
 7 either parents' consent or judicial authorization).

8
 9 **3. *There Has Been No Neutral Fact Finder That Determined That***
 10 ***Children Attending School Unmasked Is Not in the Children's Best***
 11 ***Interest.***

12 The right to family association includes the right of parents to make important medical
 13 decisions for their children, and of children to have those decisions made by their parents
 14 rather than the state." *Id.* (citing *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d
 15 101 (1979), and *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999)).

16 In an emergency medical situation, the County may proceed with medically necessary
 17 procedures without parental notice or consent to protect the child's health. See *Mueller v.*
 18 *Auker*, 700 F.3d 1180, 1187 (9th Cir. 2012) ("[P]arents have a 'constitutionally protected
 19 right to the care and custody of their children' and cannot be 'summarily deprived of that
 20 custody without notice and a hearing,' except where 'the children are in imminent danger.' ")
 21 (quoting *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997)). When there is a "reasonable
 22 concern that material physical evidence might dissipate," notice and consent may not be
 23 required. See *Wallis v Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).

24
 25 Here, there is no such medical emergency to deny Plaintiffs' due process rights and
 26 make medical decisions on their behalf, nor have Defendants' proven such emergency to
 27 justify same.
 28

1 There is no doubt that Plaintiffs have a liberty interest in the “care, custody, and control
 2 of their child[].” *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d
 3 49 (2000); *Lehr v. Robertson*, 463 U.S. 248, 256–57, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

4 It is also the case, however, that like all constitutional rights, these rights are not absolute.

5 As the Supreme Court has said, a state “has an urgent interest in the welfare of the
 6 child...” *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d
 7 640 (1981); *see also J.B. v. Washington Cnty.*, 127 F.3d 919, 925, 927 (10th Cir.1997)
 8 (*parents’ liberty interest in the custody and care of their children is balanced against the*
 9 *state’s “traditional and transcendent” interest in “acting as parens patriae” to protect*
 10 *children*); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir.1996)
 11 “[T]he liberty interest in familial relations is limited by the compelling government interest in
 12 the protection of minor children, particularly in circumstances where the protection is
 13 considered necessary as against the parents themselves.” [*Emphasis added*] (quoting *Myers*
 14 *v. Morris*, 810 F.2d 1437, 1462 (8th Cir.1987) (*internal quotation marks omitted*)).

15 When do the constitutional rights of parents step aside? “In an emergency situation ...
 16 when the children are subject to immediate or apparent danger or harm.” [*Emphasis added*]
 17 *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997); *Caldwell v. LeFaver*, 928 F.2d 331,
 18 333 (9th Cir.1991).; *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir.1983) (“When a child’s
 19 safety is threatened, that is justification enough for action first and hearing afterward.”).

20 In discussing the rights of parents to make medical decisions for their children, the
 21 Ninth Circuit made the following observations “[T]he right to family association includes the
 22 right of parents to make important medical decisions for their children, and of children to have
 23 those decisions made by their parents rather than the state. *See Parham v. J.R.*, 442 U.S. 584,
 24 602 (1979) (holding that it is in the interest of both parents and children that parents have
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ultimate authority to make medical decisions for their children unless "neutral fact finder" determines, through due process hearing, that parent is not acting in child's best interests);

[Emphasis added] see also *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (holding that "[t]he government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents.").

The interest in family association is particularly compelling at such times, in part because of the possibility that a need to make medical decisions will arise, and in part because of the family's right to be together during such difficult and often traumatic events.

Wallis v. Spencer, 202 F.3d 1126, 1141-42 (9th Cir. 2000).

At the outset, there is no emergency situation which justifies the denial of parents' ability or rights to participate in the decisions regarding the mask mandates prior to the issuance of same. The mandate was issued via Executive Directive without public notice or hearing, a blatant denial of Plaintiffs' due process rights. Such a blatant interference with fundamental rights of parental determination of medical care of their children, cannot be condoned by this Court. Accordingly, this mandate must be immediately enjoined and parental participation must be allowed.

D. DEFENDANTS MUST DEMONSTRATE THAT THIS MANDATE WAS ISSUED TO FURTHER A COMPELLING GOVERNMENT INTEREST AND MUST BE NARROWLY TAILORED TO ACHIEVE THAT INTEREST

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court has interpreted this guarantee "to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at

1 all, no matter what process is provided, unless the infringement is narrowly tailored to serve a
 2 compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

3 To survive strict scrutiny, the government must show that “the restriction ‘furthers a
 4 compelling interest and is narrowly tailored to achieve that interest.’” *Citizens United v. Fed.*
 5 *Election Comm’n*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

6 The Supreme Court has long held that “the right of parents to make decisions
 7 concerning the care, custody, and control of their children is a fundamental liberty interest
 8 protected by the Due Process Clause,” and that this right includes “the right of parents to be
 9 free from state interference with their choice of the educational forum itself.” *Fields v.*
 10 *Palmdale School District*, 427 F.3d 1197, 1204, 1207 (9th Cir. 2005)

11 Thus, even as the Court has “‘always been reluctant to expand the concept of
 12 substantive due process,’” it has repeatedly reaffirmed its recognition, in *Meyer v. Nebraska*,
 13 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)., of a “fundamental
 14 right[]” to “direct the education and upbringing of one’s children.” *Glucksberg*, 521 U.S. at
 15 720 (citation omitted); see also *Troxel*, 530 U.S. at 65 (plurality) (describing the *Meyer*-right
 16 as “perhaps the oldest of the fundamental liberty interests recognized” by the Court); *Id.* at 80.
 17 In *Meyer*, the Supreme Court struck down the Nebraska statute, concluding that it
 18 impermissibly “attempted materially to interfere . . . with the power of parents to control the
 19 education of their own.” *Id.* at 401.

20 To satisfy strict scrutiny, Defendants must show that their infringement of the
 21 Plaintiffs’ rights is “narrowly tailored” to advance a “compelling” state interest. *Church of the*
 22 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). “Stemming the spread
 23 of Covid-19 is unquestionably a compelling interest.” *Catholic Diocese of Brooklyn v Cuomo*,
 24 592 U.S. ____ (2020). The only question, therefore, is whether the State has shown that its

1 broad mandate of compelling students to wear facial masks to attend in person school satisfies
2 the narrowly tailored requirement as a matter of law.

3 **E. THIS COURT CAN ENJOIN THE MANDATE IMMEDIATELY**

4 Importantly and most recently, *Whole Woman's Health Et Al v. Austin Reeve Jackson,*
5 *Judge Et Al* 594 U. S. ____ (2021) demonstrates that this Court does have the authority to
6 enjoin the mandate under the jurisprudence cited above, including *Roe v Wade*, *Griswold v*
7 *Connecticut* and *Troxel v Granville*.

9 As the dissent cited in *Whole Woman's Health Et Al*^{Kvi} this Court is authorized to
10 permit those whom a law threatens with constitutional harm to bring pre-enforcement
11 challenges to the law where the harm is less serious and the threat of enforcement less certain
12 than the harm (and the threat) here. *See Virginia v. American Booksellers Assn., Inc.*, 484 U.
13 *S. 383, 392–393 (1988); Babbitt v. Farm Workers*, 442 U. S. 289, 298 (1979); *see also Susan*
14 *B. Anthony List v. Driehaus*, 573 U. S. 149, 164 (2014) (finding substantial threat of future
15 enforcement where statute permits “any person” to file a complaint and “the universe of
16 potential complainants is not restricted”).

18 Normally, where a legal right is “invaded,” the law provides “a legal remedy by suit
19 or action at law.” *Marbury v. Madison*, 1 Cranch 137, 163 (1803) (quoting 3 W. Blackstone
20 *Commentaries* *23). Here, these Plaintiffs bring action to this Court before violation of any
21 mask mandate by their minor children, or any other children similarly situated.

23 **F. PLAINTIFFS ARE LIKELY TO SUFFER IRREPERABLE HARM**

24 To obtain a TRO, Plaintiffs must show they will suffer irreparable harm in the absence
25 of the order. *Winter*, 555 U.S. at 20. Notwithstanding same, Plaintiffs’ Procedural and
26 Substantive Due Process rights have been violated without any justification for same. Parents
27 are unjustifiably denied their Ninth Amendment rights over child rearing and making medical
28

1 decisions on behalf of their children. This mandate continues unabated and unjustified for
 2 now 30 days into the school year with no indication of ending without Court interference of
 3 same. The medical community as suggested *supra* has provided ample evidence of the
 4 irreparable harm that such mandates will have on these students.

5 **G. BALANCE OF EQUITIES FAVORS PLAINTIFFS**

6
 7 **1. *Defendants Have Not Demonstrated That Masking Children in Classes Is***
 8 ***Narrowly Tailored to a Compelling State Interest When More than Half***
 9 ***the States Have No Mask Mandates***

10 The U.S. states and territories with mask mandates for everyone, regardless
 11 of vaccination status are District of Columbia , Guam, Hawaii, Illinois, Louisiana, Nevada,
 12 New Mexico, Puerto Rico, US Virgin Islands, Washington | The States with mask mandates
 13 for the unvaccinated are California, Connecticut and New York. These are the U.S. states and
 14 territories without mask mandates:

15 Alabama | Alaska | American Samoa | Arizona | Arkansas | Colorado | Delaware | Florida |
 16 Georgia | Idaho | Indiana | Iowa | Kansas | Kentucky | Maine | Maryland | Massachusetts |
 17 Michigan | Minnesota | Mississippi | Missouri | Montana | Nebraska | New Hampshire |
 18 New Jersey | North Carolina | North Dakota | Northern Mariana
 19 Islands | Ohio | Oklahoma | Pennsylvania | Rhode Island | South Carolina | South
 20 Dakota | Tennessee | Texas | Utah | Vermont | Virginia | West Virginia |
 21 Wisconsin | Wyoming

22
 23 It is abundantly clear by the fact that 41 States in this Country do not have mask
 24 mandates whether the individual is vaccinated or not that the efficacy of same should be in
 25 questions as applied to Clark County School District. The fact that these States' Governors
 26 have engaged in the discretionary act of not issuing mask mandates should be a clear
 27 indication of the strict scrutiny that Defendants' must overcome to justify mask mandates
 28

1 under these so-called emergency orders based on science. Moreover, Defendants have still
 2 failed to demonstrate how the mask mandates are narrowly tailored to further a compelling
 3 State interest in Nevada- when said interest does not exist in any of the 41 states that don't
 4 have mask mandates in schools. Additionally, looking at the latest CDC data, it is clear that
 5 children and teenagers still fall within the following groups of less than a 1% mortality rate
 6 (with childhood comorbidities) as demonstrated in the charts demonstrated as *Exhibit "4"*.^{xvii}
 7

8 Evaluating whether a government measure is narrowly tailored is not simply a matter
 9 of ordinary fact-finding, however. Narrow tailoring is viewed as a mixed question of fact and
 10 law that requires a delicate balancing of legal principles as applied to specific circumstances.
 11 *See Gilbrook v. City of Westminster*, 177 F.3d 839, 861 (9th Cir. 1999); *Gerritsen v. City of*
 12 *Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993).
 13

14 Plaintiffs must also show that the balance of equities tips in their favor. *Winter*, 555
 15 *U.S. at 20*. The data provided above is a canvas of all States and positivity cases across the
 16 Country which clearly demonstrates that the efficacy of facemasks in the classrooms is at best
 17 questionable to prevent the spread of Covid-19. Notwithstanding the efficacy of such mask
 18 mandate, Defendants still fail to fulfill the requirements of due process and demonstrate that
 19 the States' action should stand in place of parental decisions regarding their children's health.
 20

21 **H. AN INJUNCTION IS IN THE PUBLIC INTEREST**

22 Lastly, to obtain a TRO, Plaintiffs must show that the granting of a TRO is in the public
 23 interest., 555 *U.S. at 20*. The public interest is furthered by preventing the violation of a
 24 party's constitutional rights. *Free the Nipple v. City of Ft. Collins, Colo*, 916 F.3d 792 (2019).
 25 "[I]t is always in the public interest to prevent the violation of a party's constitutional rights."
 26 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd* sub nom.
 27 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (*quotations omitted*). Because the
 28

1 requested injunction will accomplish this, the public interest also favors an order protecting
 2 Plaintiffs making the grant of an injunction in this case a matter of overwhelming public
 3 interest.

4 CONCLUSION

5 Plaintiffs agree that no one, has a right “to expose the community...to communicable
 6 disease.” *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). *Prince v. Massachusetts*, 321
 7 U.S. 158, 166–67 (1944). But the arbitrary mask mandate on Nevada’s students without
 8 demonstrating that Plaintiffs were provided with substantive and procedural due process,
 9 which, produced a finding that the State must stand in *Parens Patriae* over their children is
 10 unconstitutional. The Fifth, Ninth and Fourteenth Amendments preclude Defendants from
 11 issuing a mandate mask use across the State and therefore must be enjoined.
 12

13
 14 Furthermore, despite 30 days of school resumed in Clark County, Defendants have no
 15 answers as to how long will students be required to wear face masks. Are students expected to
 16 wear masks forever? Will there be parental discretion ever in the future, when it comes to
 17 efficacy and treatment of this virus, or will the State continue to engage in arbitrary health
 18 decisions for parents in violation of their constitutional rights. Plaintiffs, and parents similarly
 19 situated are entitled to these answers by Defendants.
 20

21 Accordingly, Plaintiffs request an injunction be issued as follows:

22 1. Permanently enjoin Defendants and all persons and entities in active concert or
 23 participation with Defendants from the arbitrary mask mandates in Clark County School
 24 District.
 25

26 2. Issue an Order mandating that Defendants immediately allow Plaintiffs and
 27 other members of the public send their children to school without masks during in person
 28 instruction;

DATED this 20th day of September 2021.

/s/ Sigal Chattah

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